

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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ESTATE OF BONIFACE NOWAK, by its Co-  
Personal Representatives, MICHAEL NOWAK  
and MARIE ANN NOWAK,

UNPUBLISHED  
July 17, 2008

Plaintiffs-Appellees,

v

BAY COUNTY,

No. 279076  
Bay Circuit Court  
LC No. 06-003601-NO

Defendant-Appellant.

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Before: Saad, C.J., and Fort Hood and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right from the trial court order denying its motion for summary disposition pursuant to MCR 2.116(C)(7) and (C)(10) in this dispute arising out of Boniface Nowak's<sup>1</sup> fall on the steps of the Bay County Building. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

On September 30, 2005, plaintiff conducted business at the Bay County Building. While descending the front exterior stairs upon exiting the building, plaintiff tripped and fell, sustaining various injuries.

Plaintiff filed suit alleging negligence and invoking the public building exception to governmental immunity, MCL 691.1406. Defendant moved for summary disposition on the basis that plaintiff failed to establish the elements necessary to invoke the public building exception to governmental liability and, therefore, defendant is immune from liability.

The trial court denied defendant's motion for summary disposition pursuant to MCR 2.116(C)(7) and (C)(10). Defendant now appeals the denial. This Court reviews de novo a trial

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<sup>1</sup> Boniface Nowak died after defendant filed this appeal. Co-personal representatives Michael and Ann Marie Nowak represent the estate on appeal. References to "plaintiff" in the singular throughout this opinion will be to Boniface Nowak.

court's ruling on a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337, 572 NW2d 201 (1998).

When reviewing a motion for summary disposition under MCR 2.116(C)(7), a court must accept as true the plaintiff's well-pleaded factual allegations and construe them in the plaintiff's favor. The court must look to the pleadings, affidavits, or other documentary evidence to determine whether there is a genuine issue of material fact. *Guerra v Garratt*, 222 Mich App 285, 289; 564 NW2d 121 (1997). If no facts are in dispute, and reasonable minds could not differ on the legal effect of those facts, whether the plaintiff's claim is barred is a question for the court as a matter of law. *Id.* However, if a material factual dispute exists such that factual development could provide a basis for recovery, summary disposition is inappropriate. *Id.*

MCR 2.116(C)(10) provides for summary disposition where there is no genuine issue about any material fact and the moving party is entitled to judgment or partial judgment as a matter of law. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact and that the moving party is entitled to judgment as a matter of law. *Quinto v Cross & Peters Co*, 451 Mich 358, 362, 547 NW2d 314 (1996). In addition, all affidavits, pleadings, depositions, admissions, and other documentary evidence filed in the action or submitted by the parties are viewed in a light most favorable to the party opposing the motion. "Where the burden of proof ... on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in the pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists." *Id.* Where "the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted." *Id.* at 363. "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

This basis for this appeal is defendant's allegation that the trial court improperly applied the public building exception to governmental immunity and should have dismissed plaintiff's complaint based on governmental immunity.

Pursuant to MCL 691.1407(1), a governmental agency is generally immune from tort liability when it is engaged in the exercise or discharge of a governmental function. However, MCL 691.1406 provides for the public building exception to governmental immunity. The purpose of this exception is to protect the general public from injury by imposing a duty on the government to maintain safe public buildings. *Bush v Oscoda Area Schools*, 405 Mich 716, 731-732; 275 NW2d 268 (1979); *Steele v Dep't of Corrections*, 215 Mich App 710, 713; 546 NW2d 725 (1996). At the same time, the exception is to be narrowly construed. *Horace v City of Pontiac*, 456 Mich 744, 749; 575 NW2d 762 (1998).

To prove the applicability of the public building exception, a plaintiff must demonstrate that (1) a governmental agency is involved, (2) the public building at issue is open for use by members of the public, (3) a dangerous or defective condition of the public building itself exists, (4) the governmental agency possessed actual or constructive knowledge of the alleged defect, and (5) the governmental agency failed to remedy the allegedly defective condition following a

reasonable amount of time. MCL 691.1406; *Renny v Dep't of Transportation*, 478 Mich 490, 495-496; 734 NW2d 518 (2007).

In this case, there is no dispute that a governmental agency was involved or that the county building is a public building and was open for use by members of the public. Consequently, the issues relevant to this appeal are whether (1) plaintiff identified a dangerous or defective condition, (2) defendant had actual or constructive knowledge of the defective condition, and (3) defendant failed to remedy the defective condition after a reasonable period of time.

Liability may be imposed for injury resulting from a physical defect or dangerous condition of a building caused by a failure to repair or maintain, but not from a defect in design. *Renny, supra* at 500-501, 505, 507. Whether a part of the building is dangerous or defective is to be determined in the context of the uses or activities for which the building is specifically assigned. *DeSanchez v Dep't of Mental Health*, 467 Mich 231, 237; 651 NW2d 59 (2002); *Kruger v White Lake Twp*, 250 Mich App 622, 625; 648 NW2d 660 (2002). The injury must result from a defect or condition of the building itself. *Jackson v Detroit*, 449 Mich 420, 428; 537 NW2d 151 (1995).

Here, plaintiff submitted photographs and testimony depicting deterioration of the stairs upon which he fell. Additionally, plaintiff set forth evidence establishing a genuine issue as to whether debris that had separated and fallen from the exterior of the building had accumulated on the stairs. Plaintiff submitted photographs taken within an hour of the accident depicting patches, cracks and gravel on the stairs along with "scaling" on the building. A maintenance person who was on the scene the day of the accident substantiated plaintiff's claim that concrete debris was present on the stairs at issue.

The existence of debris and that the debris may have been the result of deterioration of the stairs was also confirmed by defendant's grounds coordinator who noted the presence of stones and the existence of a crack on the stairs. The grounds coordinator admitted that the stairs required regular and repeated patching. Finally, the affidavit of a licensed builder who examined the stairs within ten days of the accident stated, "On November 11, 2005 subject stairway was photographed during the daytime and the presence of scaling and missing concrete and debris are open and obvious."

As set forth above, the public building exception also contains a knowledge requirement. Concomitant to that requirement is a notice requirement, which is not at issue in this case. MCL 691.1406 provides in part:

Knowledge of the dangerous and defective condition of the public building and time to repair the same shall be conclusively presumed when such defect existed so as to be readily apparent to an ordinary observant person for a period of 90 days or longer before the injury took place. As a condition to any recovery for injuries sustained by reason of any dangerous or defective public building, the injured person, within 120 days from the time the injury occurred, shall serve a notice on the responsible governmental agency of the occurrence of the injury and the defect. The notice shall specify the exact location and nature of the defect, the

injury sustained and the names of the witnesses known at the time by the claimant.

Thus, a plaintiff asserting the building exception to governmental immunity must show actual or constructive knowledge of the defect, and a failure to act on the part of the responsible agency within a reasonable time. *Kerbersky v Northern Michigan Univ*, 458 Mich 525, 529; 582 NW2d 828 (1998). Constructive knowledge of a defect may be established by showing that the agency should have discovered the defect in the exercise of reasonable diligence and through the length of time the defect existed. *Ali v Detroit*, 218 Mich App 581, 586-587; 554 NW2d 384 (1996); *Singerman v Municipal Service Bureau, Inc*, 211 Mich App 678, 686; 536 NW2d 547 (1995).

Plaintiff proffered evidence that defendant had actual or constructive knowledge of the deterioration of the stairs. The licensed builder opined that based on the nature of the “problems with the subject stairway,” defendant necessarily had ongoing knowledge of the deterioration “prior to September 30, 2005.” Plaintiff also supplied a report generated by defendant approximately five months before the accident requesting a repair to the subject stairs and indicating that it “might be a major job.” Unlike other entries on the report, there is no indication the repair was ever made. Finally, defendant’s grounds coordinator noted that the stairs had regularly required patching in the past.

Sufficient evidence was presented depicting the defective condition of the stairs at the time of the accident, along with the evidence suggesting that defendant was aware of the condition of the stairs, to create a genuine issue of material fact so as to survive a motion for summary disposition.

Affirmed.

/s/ Henry William Saad  
/s/ Karen M. Fort Hood  
/s/ Stephen L. Borrello